



UNITED STATES DEPARTMENT OF EDUCATION

JUL 18 2014

Dear Chief State School Officers:

We write to transmit the attached guidance document regarding the inclusion of English Learners (ELs) with disabilities in English language proficiency (ELP) assessments under Titles I and III of the Elementary and Secondary Education Act of 1965, as amended (ESEA). These are assessments designed to measure the progress of ELs in attaining English language proficiency. The Office of Elementary and Secondary Education (OESE) in the U.S. Department of Education (Department) administers the ESEA, and the Department's Office of Special Education and Rehabilitative Services (OSERS) administers Part B of the Individuals with Disabilities Education Act (IDEA). States and local educational agencies (LEAs) have raised questions to the Department related to the participation of ELs with disabilities in the annual State ELP assessment and the inclusion of their ELP assessment results in Title III Annual Measurable Achievement Objectives (AMAOs). Accordingly, OESE and OSERS are issuing the attached guidance to help States and LEAs understand how Part B of the IDEA and Titles I and III of the ESEA address the inclusion of ELs with disabilities in annual State ELP assessments.

The attached guidance consists of frequently asked questions in five sections: (1) General Obligations; (2) Role of the individualized education program (IEP) Team; (3) Accommodations and Alternate Assessments; (4) Exit from EL Status; and (5) AMAOs. If you have additional questions related to this document, please contact Supreet Anand in OESE at Supreet.Anand@ed.gov or Jessica Spataro in OSERS at Jessica.Spataro@ed.gov. Thank you for your continued efforts to ensure successful educational outcomes for all children.

Sincerely,

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Assistant Secretary
Office of Elementary and
Secondary Education

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Attachment

cc: State Directors of Special Education
Title III State Directors
Title I State Directors

Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives

Purpose and Background:¹

Education personnel in States, local educational agencies (LEAs), and schools across the nation have described challenges in developing and administering English language proficiency (ELP) assessments required under Titles I and III of the Elementary and Secondary Education Act of 1965, as amended (ESEA), to students who are both English Learners (ELs) and students with disabilities. Some of these challenges include: 1) ensuring that all ELs with disabilities participate in the annual State ELP assessment; 2) administering an annual State ELP assessment that accurately measures the English language proficiency of students with disabilities, including providing individual appropriate accommodations in accordance with a student's individualized education program (IEP), as required by the Individuals with Disabilities Education Act (IDEA); 3) administering appropriate alternate assessments to the annual State ELP assessment in accordance with the student's IEP, as required by the IDEA; and 4) determining how to include the results of annual State ELP assessments for students with disabilities in making accountability determinations under the ESEA.

The questions and answers included in this document are intended to help States and LEAs address these challenges, and more broadly, to understand how Part B of the IDEA and Titles I and III of the ESEA address the inclusion of ELs with disabilities in annual State ELP assessments. These are assessments designed to measure the progress of ELs in attaining English language proficiency.

In this document, the term “English Learner” (EL) means students who are considered limited English proficient (LEP) as defined in section 9101(25) of the ESEA.² The term “students with disabilities,” as it is used in this document, refers to “children with disabilities” who are eligible for services under the IDEA, as defined in section 602(3) of that Act and 34 CFR §300.8. While students with disabilities are also protected under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (ADA), which are civil rights

¹ The Department has determined that this document is a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The purpose of this guidance is to provide States, local educational agencies, and schools with information to assist them in meeting their obligations under Titles I and III of the Elementary and Secondary Education Act of 1965, as amended. This guidance does not impose any requirements beyond those required under applicable law and regulations. It does not create or confer any rights for or on any person. If you are interested in commenting on this guidance or if you have further questions that are not answered here, please e-mail OESEGuidanceDocument@ed.gov using the subject “Inclusion of English Learners with Disabilities” or write to us at the following address: U.S. Department of Education, Office of Elementary and Secondary Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

² The ESEA defines the term “limited English proficient” (LEP) in part as students “...whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual the ability to meet the State's proficient level of achievement on State assessments...” (ESEA section 9101(25)). The complete definition of limited English proficient is available at: www2.ed.gov/policy/elsec/leg/esea02/pg107.html#sec9101. www2.ed.gov/policy/elsec/leg/esea02/pg107.html#sec9101 For Title III purposes, the U.S. Department of Education (ED) refers to the four domains of the English language as “speaking, listening, reading and writing,” as set forth in the Notice of Final Interpretations for Title III (73 Fed.Reg. 61828, 61829 n.5).

laws that prohibit disability discrimination, this document focuses on assessment requirements under the IDEA and does not address the rights of students with disabilities under Section 504 and Title II of the ADA.³

Titles I and III of the ESEA require States and LEAs to annually assess the English language proficiency of all ELs enrolled in public schools in the domains of speaking, listening, reading, and writing (ESEA sections 1111(b)(7), 3113(b)(3)(D)). One of the purposes of Title III of the ESEA is to assist ELs in both attaining ELP and meaningfully accessing academic content in English (ESEA section 3102). Section 612(a)(16)(A) of the IDEA requires that all students with disabilities be included in all general State and districtwide assessment programs, including assessments described under section 1111 of the ESEA, with appropriate accommodations and alternate assessments, where necessary, as indicated in their respective IEPs.⁴ This requirement includes the annual State ELP assessment.

According to the 2013 Biennial Report to Congress on implementation of the ESEA Title III State Formula Grant Program (school years 2008–2010), there were 4,649,316 ELs enrolled in U.S. schools in the 2009–2010 school year, or nearly ten percent of the roughly 50 million students attending U.S. elementary and secondary schools.⁵ There are over 500,000 ELs with disabilities in public schools in the U.S., based on the most recent available data.⁶

This document is intended to assist States and LEAs in serving, assessing, and including in Title III accountability measures, those ELs who are also students with disabilities.

³ Section 504 and Title II of the ADA protect all students with disabilities, as defined in 29 U.S.C. §§705 (9) and (20) and 42 U.S.C. §12102, including students with disabilities who are not eligible for services under the IDEA. These students (sometimes referred to as “504-only” students) are entitled to appropriate testing accommodations under Section 504 and Title II of the ADA. More information about Section 504 and Title II of the ADA is available on the Web site of the Office for Civil Rights (OCR) in the U.S. Department of Education, www.ed.gov/ocr/index.html. In addition, Title VI of the Civil Rights Act of 1964 (Title VI) is a Federal civil rights law that applies to EL students, including ELs with disabilities. OCR is responsible for enforcing these laws. As reflected in OCR policy, schools must appropriately provide alternative language services to EL students to ensure meaningful access to the education program. A school must make an individualized determination of the student’s ELP needs. See www.ed.gov/OCR for more information.

⁴ An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 CFR §§300.320-300.324 (34 CFR §300.320(a)). In question four below, we describe the IEP requirements relevant to the participation of students receiving services under Part B of the IDEA in Statewide assessment programs.

⁵ The Biennial Report to Congress is based upon State-reported data reported annually to the U.S. Department of Education through the Consolidated State Performance Report.

⁶ In 2012, the most recent year for which data were collected, 9.07 percent of all students with disabilities ages 6 through 21 who were enrolled in public schools in the U.S., outlying areas, and freely associated States (527,970) were LEP. These numbers do not include those ELs who have been determined to have a disability under Section 504 but who do not qualify for special education services under the IDEA. Source: U.S. Department of Education, *EDFacts* Data Warehouse (EDW), OMB # 1875-0240: “IDEA Part B Child Count and Educational Environments Collection,” 2012.

Available at <https://explore.data.gov/Education/2012-IDEA-Part-B-Child-Count-and-Educational-Envir/5t72-4535>.

The most recent available data on ELs indicate that 12.30% of LEP students enrolled in language instruction educational programs in U.S. public schools were students with disabilities (540,660) during the 2012-2013 school year. U.S. Department of Education, SY 2012-13 *EDFacts* Data Group 123. Note that this data group consists of a count of LEP students in language instruction educational programs, not all LEP students.

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Questions and Answers:

General Obligations

1. What are the Federal requirements for including ELs with disabilities in the annual State ELP assessment?

The IDEA requires each State and its LEAs to ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities residing in the State in mandatory age ranges, beginning at age 3 and possibly lasting to a child's 22nd birthday, depending on State law or practice (34 CFR §§300.101-300.102). These entities also must ensure that the IDEA's rights and protections are extended to eligible children and their parents (34 CFR §§300.100 and 300.201). The IDEA and its regulations require that all students with disabilities be included in all general State assessment programs, including assessments described under section 1111 of the ESEA, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs (section 612(a)(16)(A) of the IDEA, 34 CFR §300.160(a), and section 1111(b) of the ESEA).⁷

Both Titles I and III of the ESEA require States and LEAs to annually assess the English proficiency of all ELs in the State enrolled in public schools in grades kindergarten through twelve in the domains of speaking, listening, reading, and writing (sections 1111(b)(7) and 1123(b)(3)(D) of the ESEA). Accordingly, as part of a general State assessment program, all ELs with disabilities must participate in the annual State ELP assessment with or without appropriate accommodations or by taking an alternate assessment, if necessary, consistent with their IEPs. The IDEA, Titles I and III of the ESEA, and Federal civil rights laws require that all children, including children with disabilities, take Statewide assessments that are valid and reliable for the purpose for which they are being used, and this includes the annual ELP assessment.

2. What are the ways that ELs with disabilities can participate in the annual State ELP assessment?

ELs with disabilities can participate in the annual State ELP assessment in the following ways, as determined by their respective IEP Teams:

- a) in the regular State ELP assessment without accommodations (in the same way as ELs without disabilities take the assessment);
- b) in the regular State ELP assessment through the use of one or more appropriate accommodations as indicated in the student's IEP; or
- c) in an alternate assessment aligned to State ELP standards, if the IEP Team determines that the student cannot participate in the regular State ELP assessment, with or without appropriate accommodations.

⁷ Because the annual ELP assessment is a general State assessment administered to all ELs and is an assessment described in section 1111 of the ESEA, this document will refer to the IDEA's requirement for including all children with disabilities, including ELs with disabilities, in all general State assessment programs.

(See questions eight through ten for more details.)

3. What steps can States take to ensure that all ELs with disabilities are included in the annual State ELP assessment?

Consistent with 34 CFR §300.160(b)(2)(i) and (c)(1), States must develop guidelines for the provision of appropriate accommodations, for each assessment, that do not invalidate test scores, and guidelines for the participation of children with disabilities in alternate assessments who cannot take the regular assessment, even with accommodations. (See question 8.) These guidelines apply to all alternate assessments, not just to Title I alternate assessments in reading/language arts, math, and science, and should include criteria for IEP Teams to use in determining which ELs with disabilities should take an alternate assessment to the regular annual State ELP assessment. In developing such guidelines, States should seek input from appropriate individuals with expertise in language acquisition and in the provision of services to students with disabilities (such as speech-language pathologists who are knowledgeable about second language acquisition and the language needs of students with disabilities), bilingual/English as Second Language (ESL) teachers, or other professionals with expertise in language acquisition. States should also ensure through monitoring that these policies are being implemented at the LEA and/or school levels.

In carrying out the steps described above, it would be permissible for States to use a portion of their IDEA Part B funds reserved for State-level activities to support the development and provision of appropriate accommodations for children with disabilities, or for the development and provision of alternate assessments that are valid and reliable for assessing the performance of students with disabilities, in accordance with sections 1111(b) and 6111 of the ESEA (34 CFR §300.704(b)(4)(x)).

Role of the IEP Team

4. What is the responsibility of the IEP Team in determining how ELs with disabilities participate in the annual State ELP assessment?

Decisions about the content of a student's IEP, including whether a student must take a regular State assessment (in this case, the ELP assessment), with or without appropriate accommodations, or an alternate assessment in lieu of the regular ELP assessment, must be made by the student's IEP Team. These decisions cannot be made unilaterally by a single teacher or other school employee outside of the IEP process described in 34 CFR §§300.320 through 300.324.

The IEP Team is responsible for developing the IEP for each student with a disability, including each EL with a disability, at an IEP Team meeting which includes school officials and the child's parents. In question five below, we provide more information about IEP Team participants. Under the IDEA regulations at 34 CFR §300.320(a)(6), the IEP must include:

- (i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and

- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—

- (A) The child cannot participate in the regular assessment; and

- (B) The particular alternate assessment selected is appropriate for the child;

IEPs for ELs with disabilities must comply with all of the other IDEA requirements in 34 CFR §§300.320-300.324.

5. Should IEP Teams for ELs with disabilities include persons with expertise in second language acquisition?

Yes. It is important that IEP Teams for ELs with disabilities include persons with expertise in second language acquisition and other professionals, such as speech-language pathologists, who understand how to differentiate between limited English proficiency and a disability. The participation of these individuals on the IEP Team is essential in order to develop appropriate academic and functional goals for the child and provide specially designed instruction and the necessary related services to meet these goals.

The IDEA regulation in 34 CFR §300.321(a) specifies that the participants on each child's IEP Team include:

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who –
 - (i.) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii.) Is knowledgeable about the general education curriculum; and
 - (iii.) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) Whenever appropriate, the child with a disability.

It is important that IEP Teams for ELs with disabilities include a public agency representative, as described previously, who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of ELs with disabilities. This representative should be knowledgeable about the availability of agency resources needed to enable ELs with disabilities

to meaningfully access the general education curriculum. This will ensure that the services included in the EL student's IEP are appropriate for the student and can actually be provided.

Under the IDEA, the IEP Team must consider a number of special factors in developing, reviewing, or revising a child's IEP. Under 34 CFR §300.324(a)(2)(ii), the IEP Team must "[i]n the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP." Therefore, to implement this requirement, the IEP Team should include participants who have the requisite expertise about the student's language needs.

An IEP Team that includes appropriate members should be able to make thoughtful decisions about the content of an EL's IEP, including the manner in which the student participates in the annual State ELP assessment. In addition, States and LEAs are encouraged to provide other IEP Team members with appropriate training in language acquisition and the unique needs of ELs with disabilities.

6. What must an LEA and IEP Team do to ensure that limited English proficient parents understand and are able to meaningfully participate in IEP Team meetings at which the child's participation in the annual State ELP assessment is discussed?

The IDEA requires that the parents of a child with a disability be given the opportunity to participate in meetings with respect to the identification, evaluation, or educational placement of a child with a disability, or the provision of a FAPE to the child (34 CFR §300.501(b)(1)). Regarding the participation of a parent whose native language is other than English in IEP Team meetings, the IDEA regulations require each public agency to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter. (34 CFR §300.322(e)). When parents themselves are LEP, Title VI of the Civil Rights Act of 1964 also requires that the LEA must effectively communicate with parents in a manner and form they can understand, such as by providing free interpretation and/or translation services. Under Title VI, an LEA is required to provide LEP parents with meaningful access to the same information that is provided to non-LEP parents.

7. Can an IEP Team determine that a particular EL with a disability should not participate in the annual State ELP assessment?

No. All ELs, including those with disabilities, must participate in the annual State ELP assessment, with or without accommodations, or must take an appropriate alternate assessment, if necessary (section 1111(b)(7) of the ESEA and section 612(a)(16)(A) of the IDEA).

(See the response to question one above.)

Accommodations and Alternate Assessments

8. What actions must States take to meet the IDEA requirements related to accommodations and alternate assessments for the annual State ELP assessment?

Under the IDEA, a State must:

- 1) Develop guidelines for the provision of appropriate accommodations. The State's guidelines must identify only those accommodations for each assessment that do not invalidate the score, and instruct IEP Teams to select, for each assessment, only those accommodations that do not invalidate the score (34 CFR §300.160(b)); and
- 2) Develop and implement alternate assessments and guidelines for the participation of students with disabilities in alternate assessments for those students who cannot participate in regular assessments, even with accommodations, as indicated in their respective IEPs (34 CFR §300.160(c)(1)). Because the annual ELP assessment is a State assessment, these guidelines must also address the participation of ELs with disabilities in alternate assessments to the regular ELP assessment.

9. How can an IEP Team determine whether an EL with a disability should receive accommodations in order to take the annual State ELP assessment?

An IEP Team must make this determination on a case-by-case basis in light of the particular needs of an EL with a disability. As part of the process of determining the appropriate accommodations for ELs with disabilities on the annual State ELP assessment, the IEP Team must consider the student's language needs as they relate to his or her IEP (34 CFR §300.324(a)(2)(ii)). The IEP Team then needs to determine if there is an appropriate State-approved accommodation(s) for the annual State ELP assessment that would not invalidate the test score, which would allow the student to participate in the assessment to demonstrate what the student knows and can do. If the IEP Team determines that the student needs accommodations to take the regular ELP assessment or an alternate assessment, then the student's IEP must contain a statement of the individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on that State assessment (34 CFR §300.320(a)(6)(i)). Appropriate and allowable accommodations used for testing should generally be the same as those used in the classroom in accordance with the student's IEP.

An IEP Team could determine that accommodations need to be used for the entire ELP assessment, or only for part of the assessment. For example, an accommodation that is appropriate for only one of the four domains of language (speaking, listening, reading, or writing) would be used just for that particular subtest. The IEP Team will need to ensure that the student is familiar with the accommodations to be used for the ELP assessment, that the student is using similar accommodations in classroom instruction, and that the student could benefit from similar accommodations on the ELP assessment.

10. How can an IEP Team determine whether an EL with a disability should take an alternate assessment instead of the regular ELP assessment?

An IEP Team must make this determination on a case-by-case basis in light of the particular needs of an EL with a disability. If an IEP Team for a particular EL with a disability determines that the student cannot participate in the regular State ELP assessment, even with individual appropriate accommodations, then the IEP Team would determine that the student needs to take an alternate assessment to the regular ELP assessment. In this situation, the Team must include in the child's IEP a statement of:

- (1) Why the child cannot participate in the regular ELP assessment; and
- (2) Why the particular alternate assessment selected is appropriate for the child (34 CFR §300.320(a)(6)(ii)).

Consistent with applicable State guidelines for alternate assessments, States need to identify how an EL with a disability can be appropriately and validly assessed through an alternate assessment to guide IEP Team decisions in this area. An alternate ELP assessment could be a traditional paper and pencil assessment, or another appropriate method for assessing the student's language proficiency, such as a computer-based adaptive assessment. Regardless of what alternate assessment is used, it must be a valid and reliable assessment that: 1) provides evidence of progress toward the attainment of English proficiency; 2) is aligned with State ELP standards; and 3) yields a valid score. ESEA section 3122(a)(3); Notice of Final Interpretations for Title III, Interpretation #2 (Oct. 17, 2008), 73 Fed. Reg. 61828, 61831-61833. States should examine their alternate assessment guidelines to ensure that they address the participation of ELs with disabilities in alternate assessments if those students cannot be appropriately assessed with the regular ELP assessment, even with individual appropriate accommodations.

Exit from EL Status

11. When and how can an EL with a disability be exited from EL status?

An EL with a disability can be "exited" from EL status when he/she no longer meets the definition of an EL (see footnote on page 1). This occurs when the student meets the State's definition of "proficient" in English. Depending on the State's definition of proficiency, the LEA, school personnel, and/or the IEP Team may have input into the decision of whether a student is proficient in English.

However, there is no provision in the IDEA that would authorize the IEP Team to remove the "EL" designation before the student has attained English proficiency. In addition, other LEA and/or school personnel do not have the authority under Federal law to remove a student's EL designation before the student has been deemed proficient in English solely because the student has an IEP.

Annual Measureable Achievement Objectives (AMAOs)

12. Must the ELP assessment results for all ELs with disabilities be included in Title III AMAOs 1 and 2?

Yes. Title III AMAOs have three parts, two of which (AMAOs 1 and 2) are based upon the State ELP assessment. Results from ELP assessments for all ELs, including students with disabilities, must be included in both AMAO 1 (making progress in English) and AMAO 2 (attaining ELP), as described in section 3122(a)(3) of the ESEA. For some ELs with disabilities, accommodations may be necessary on the ELP assessment (see question nine), and an alternate ELP assessment may be necessary for an even smaller group of ELs with disabilities (see question ten), but all ELP assessment results must be included in the Title III accountability calculations under AMAOs 1 and 2.

13. Are the ELP assessment results for ELs with disabilities relevant to AMAO 3 of Title III?

No. Under Title III, the third AMAO (AMAO 3) is based on making adequate yearly progress (AYP) under Title I for the EL subgroup. AYP is comprised of meeting annual measurable objectives (AMOs) based on proficient achievement on State reading/language arts and mathematics assessments, achieving 95 percent participation on those assessments, and meeting the other academic indicator, which is graduation rate for high schools. The ELP assessment results are not a factor in AYP calculations.

A State that is participating in ESEA flexibility may have received a waiver of making AYP determinations. For purposes of measuring AMAO 3, therefore, the State would determine whether the EL subgroup met the State's AMOs in reading/language arts and mathematics, the 95 percent participation rate requirement, and, for an LEA that includes one or more high schools, graduation rate.

Under the Title I regulations in 34 C.F.R. §200.13(c)(2)(i), in calculating AYP or accountability determinations under ESEA flexibility, a State may include the proficient and advanced scores of students with the most significant cognitive disabilities who take an alternate assessment in reading/language arts or mathematics based on alternate academic achievement standards described in 34 C.F.R. §200.1(d), provided that the number of such scores at the LEA level and at the State level, separately, does not exceed 1.0 percent of all students in the grades assessed. Some ELs with disabilities may be among the students with the most significant cognitive disabilities covered by these regulations. These regulations, however, do not apply to ELP assessments and, consequently, to AMAOs 1 and 2.

In reporting under Title I and targeting interventions in Title I schools, States must take into account the performance of student subgroups, including ELs and students with disabilities, on reading/language arts and mathematics assessments. Similarly, States must report the graduation rate of each subgroup for high schools. Thus the scores and, if applicable, graduation rate of an EL with a disability would be included under both the EL subgroup and the students with disabilities subgroup (as well as under any other subgroup to which the student belongs). The ESEA does not require subgroup reporting for the ELP assessment under Title III.

Addendum to Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives Issued July 18, 2014 (2014 Qs and As)¹

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¹ The Qs and As can be accessed at the following link:

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf>.

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Questions and Answers:

Initial Identification

Consistent with obligations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, schools must take affirmative steps to ensure that students with limited English proficiency can meaningfully participate in their educational programs and services. This requires a mechanism for initially identifying a student as an English learner (EL).² Some States and local educational agencies (LEAs) use an EL screening assessment or tool to determine whether students are ELs who are in need of language assistance services. Other States and LEAs use the annual English Language Proficiency (ELP) assessment required in section 1111(b)(7) of the ESEA for this purpose. The term “EL screener” will be used in questions 14 and 15 to encompass both identification mechanisms. Question 14 addresses the importance of the EL screener for students with disabilities or for students suspected of having a disability under the IDEA, and question 15 addresses whether it could be permissible to use IDEA funds in connection with the EL screening process. Questions 16 and 17 address the appropriate and timely evaluation and identification of ELs as students with disabilities under the IDEA.

14. Why is it important to consider the results of an EL screener for students with disabilities or students suspected of having a disability?

Under the IDEA, a student may not be determined to be a student with a disability if the determinant factor is the student’s limited English proficiency, and if the student does not otherwise meet the IDEA’s definition of a “child with a disability” (34 CFR §300.306(b)(1)(iii) and (2)). To ensure that the IDEA eligibility determination is based on the student’s disability and need for special education and related services, and not solely on a student’s limited English proficiency, providing accommodations on the regular EL screener or administering an alternate form of the EL screener could be necessary to give a

² As noted in the 2014 Qs and As, the term “English Learner” (EL) means a student who is considered limited English proficient (LEP) as defined in section 9101(25) of the ESEA. The term “students with disabilities,” as used in this document, refers to children who meet the definition of “child with a disability” in section 602(3) of the IDEA and 34 CFR §300.8 of the IDEA Part B regulations.

student with a disability, or a student suspected of having a disability, a meaningful opportunity to accurately demonstrate his or her English language proficiency.

An EL screener may be necessary after a child is found eligible for services under the IDEA but has not yet been determined to be an EL. In developing, reviewing, or revising the IEP for a student with limited English proficiency, one of the special factors that the IEP Team must consider is how the language needs of the student relate to the student's IEP (34 CFR §300.324(a)(2)(ii) and (b)(2)). For a description of the IEP Team participants, see 2014 Qs and As question four. Thus, the student's ELP level indicated by the EL screener could provide information that the IEP Team could use in ascertaining the student's language needs and ensuring that the student receives a program of special education and related services, and supplementary aids and services, designed to enable the student to advance appropriately toward attaining his or her annual IEP goals and to be involved and make progress in the general education curriculum (34 CFR §300.320(a)(4)(iv)). Also, it may be necessary to revisit EL determinations for students with disabilities who were previously identified as ELs based on a regular EL screener, but who may have been inappropriately identified as ELs based on their disabilities due to lack of accommodations or an alternate EL screener.

15. Can IDEA funds be used to identify a student with a disability, or a student suspected of having a disability, as an EL?

Yes. It may be possible to use IDEA funds in connection with the EL screening process, as long as using those funds is consistent with the requirements in Part B of the IDEA.³ IDEA Part B consists of the Grants to States program for children with disabilities ages three through 21, authorized by section 611 of the IDEA, and the Preschool Grants program for children with disabilities ages three through five, authorized by section 619 of the IDEA.

There are two possible funding sources:

- IDEA Part B funds reserved for other State-level activities (34 CFR §§300.704(b) (Grants to States) and 300.814 (Preschool Grants)); and
- Subgrants to eligible LEAs for the provision of special education and related services (34 CFR §§300.705 (Grants to States) and 300.815-300.816 (Preschool Grants)).

It may be permissible for States and LEAs to use a portion of these funds to support the development and provision of an EL screener designed specifically for students with disabilities, and for appropriate accommodations for students with disabilities on the regular EL screener.

³ Funds paid to a State under Part B of the Act, including Part B funds reserved for other State-level activities, must be expended in accordance with all of the provisions of 34 CFR Part 300 (34 CFR §300.162(a)). Amounts provided to the LEA under Part B of the Act must be expended in accordance with the applicable provisions of 34 CFR Part 300 (34 CFR §300.202(a)(1)).

16. Does Federal law provide that ELs may not be evaluated for special education services for a certain period of time?

No. There is no such requirement in either the ESEA or the IDEA. Specifically, under the IDEA, States and LEAs are required to have policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated (34 CFR §§300.111 and 300.201). This obligation, known as “child find,” is fully applicable regardless of a child’s ELP level, and includes highly mobile children and migrant children suspected of having a disability under the IDEA (34 CFR §300.111(c)(2)).

The LEA proposing to conduct an initial evaluation to determine whether a child qualifies as a child with a disability under 34 CFR §300.8 must, after providing notice, obtain informed consent from the child’s parent before conducting the evaluation (34 CFR §300.300(a)).⁴ Once parental consent is obtained, the evaluation must occur in a *timely* manner. Specifically, under 34 CFR §300.301(c), the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation or, if the State has established a timeframe within which the evaluation must be conducted, within the State-established timeframe.

17. How can States ensure the appropriate identification of ELs with disabilities and prevent the over/under identification of ELs for special education services?

To ensure that EL students with disabilities are appropriately evaluated and determined eligible for special education and related services, public agencies must adhere to applicable IDEA procedures in conducting evaluations and reevaluations of ELs (34 CFR §§300.300-300.311).

As explained in the *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* jointly issued on January 7, 2015, by the Department and the Department of Justice (2015 DCL):⁵

The Departments are aware that some school districts have a formal or informal policy of “no dual services,” *i.e.*, a policy of allowing students to receive either EL services or special education services, but not both. Other districts have a policy of delaying disability evaluations of EL students for special education and related services for a specified period of time based on their EL status. These policies are impermissible under the IDEA and Federal civil rights laws... (p. 25)

⁴ Notice must be provided consistent with 34 CFR §§300.503 and 300.504. Parental consent must be obtained consistent with 34 CFR §300.9.

⁵ The DCL can be accessed at the following link: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

Delaying a referral for an evaluation can result in the under-identification of ELs as “children with disabilities” under the IDEA. There is also the possibility of over-identification of ELs as having a disability if a school district wrongly determines that a student’s language difficulties are due to a disability rather than lack of English language proficiency. Such determinations are inconsistent with the IDEA, which provides that a child’s limited English proficiency may not be the determinant factor in the child’s disability determination (34 CFR §300.306(b)(1)(iii) and (2)).

To ensure that students, including ELs, are appropriately evaluated, the IDEA specifies that, among other requirements, assessments and other evaluation materials must be selected and administered so as not to be discriminatory on a racial or cultural basis, and be provided and administered in the student’s native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so (34 CFR §300.304(c)(1)).

Under the IDEA, a group of qualified professionals and the child’s parent determines whether a child is a “child with a disability,” as defined in the IDEA (34 CFR §300.306(a)). In interpreting evaluation data for the purpose of determining a student’s eligibility and educational needs, this group must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, and social or cultural background (34 CFR §300.306(c)(1)(i)). Therefore, proper application of these IDEA evaluation and eligibility requirements should ensure the appropriate identification of ELs as children with disabilities under IDEA.

The following resources address practices that are important in avoiding misidentification of ELs as students with learning disabilities:

- “Tools and Resources for Identifying All English Learners,” available at <http://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html>;
- A report titled, “Processes and Challenges in Identifying Learning Disabilities Among English Language Learner Students in Three New York State Districts,” prepared for the Institute of Education Sciences at the U.S. Department of Education in February 2010, available at <http://ies.ed.gov/ncee/edlabs/projects/project.asp?projectID=116>; and
- A report titled, “Identifying and Supporting English Learner Students with Learning Disabilities: Key Issues in the Literature and State Practice,” prepared for the Institute of Education Sciences at the U.S. Department of Education in July 2015, available at <http://ies.ed.gov/pubsearch/pubsinfo.asp?pubid=REL2015086>.

Role of the IEP Team

18. What guidance and resources are available to assist IEP Teams in determining whether an EL with a disability should take the regular ELP assessment with accommodations or an alternate assessment?

As explained in the 2014 Qs and As question eight, States are required to develop guidelines for IEP Teams to use in determining what are appropriate accommodations on the annual ELP assessment and whether an EL with a disability needs to take an alternate assessment to the annual ELP assessment (34 CFR §300.160(b)-(c)).

Federal resources to support States in this area are offered through Department-funded technical assistance centers such as the National Center for Educational Outcomes (NCEO) and the Center for Parent Information and Resources (CPIR). CPIR provides an annotated list of resources that address how to make determinations regarding accommodations and alternate assessments.⁶ While these resources do not necessarily address ELP assessments, their content is generally applicable to ELP assessments.

The following are examples from the list:⁷

Accommodations Manual: How to Select, Administer, and Evaluate Use of Accommodations for Instruction and Assessment of Students with Disabilities

This includes fact sheets and teacher tools.

www.osepideasthatwork.org/toolkit/accommodations_manual.asp;

Online Accommodations Bibliography

NCEO resource on the range of possible accommodations and what empirical research studies have to say about the effects of various testing accommodations for students with disabilities.

www.cehd.umn.edu/NCEO/OnlinePubs/AcommBibliography/AccomStudies.htm;

Special Topic Area: Accommodations for Students with Disabilities

NCEO answers frequently asked questions about testing accommodations for students with disabilities, connects you with State policies and research in this area, and offers a number of research-based publications to guide policy and decision-making.

www.education.umn.edu/NCEO/TopicAreas/Accommodations/Accomtopic.htm;

Alternate Assessments – Frequently Asked Questions

This FAQ is available as part of the OSEP Ideas That Work Toolkit.

www.osepideasthatwork.org/parentkit/AltAssessFAQ.asp; and

⁶ These resources can be accessed at the following link: www.parentcenterhub.org/repository/assessment-accommodations/.

⁷ Information about resources included in the responses to questions 17 and 18 is provided for the reader's convenience and is included here to offer examples of the many resources that educators, parents, advocates, administrators, and other interested parties may find helpful and use at their discretion. The inclusion of links to resources does not reflect their importance, nor is such inclusion intended to endorse any views expressed or materials provided.

The National Alternate Assessment Center

The Center offers information and technical assistance on the design and administration of high-quality alternate assessments.

www.naacpartners.org/Default.aspx.

Accommodations and Alternate Assessments

19. May States develop alternate ELP standards for ELs with disabilities to define what they know in English and are able to do in English?

No. Under Title III of the ESEA, States must develop and implement one set of ELP standards, which must be aligned to the State's academic content and student academic achievement standards (section 3113(b)(2) of the ESEA).

20. Are all ELs with disabilities expected to have their ELP assessed in the same way as ELs without disabilities?

The same ELP standards are the basis for the annual ELP assessment under section 1111(b)(7) of the ESEA, and are required for all ELs with and without disabilities. However, appropriate accommodations can be provided on the regular ELP assessment, or an alternate assessment can be developed for an EL with disabilities who cannot take the regular ELP assessment even with accommodations as determined by the student's IEP Team, so that the student can demonstrate growth and proficiency in the English language. See 2014 Qs and As eight through 10.

21. May a State use different cut scores or achievement standards on the State ELP assessment for determining whether ELs with disabilities are proficient in English?

No. There is no provision in the ESEA that permits alternate achievement standards on the annual ELP assessment. However, to ensure that the language proficiency of ELs with disabilities is validly and reliably assessed, the IEP Team must determine whether an EL with a disability needs to receive appropriate accommodations on the regular annual ELP assessment, or needs to take an alternate assessment to the regular ELP assessment if he or she cannot take the regular ELP assessment, even with appropriate accommodations.

22. May a State use Title III funds to develop an alternate ELP assessment for students with disabilities?

As stated in the Department's October 2008 supplement, not supplant guidance,⁸ most States will not be able to use Title III funds to pay for the cost of developing ELP assessments without violating the supplement, not supplant provision under section 3115(g) of the ESEA because Title I requires States to administer annual ELP assessments.

While States cannot generally use Title III funds to develop alternate ELP assessments, section 6111(2)(B) of the ESEA provides funds for developing or improving ELP assessments, including alternate ELP assessments, necessary to comply with section 1111(b)(7) of the ESEA.

23. May a State use Title III funds for SEA capacity-building activities, such as funding a meeting to gather stakeholders to make determinations about how to develop an alternate ELP assessment?

A State may be able to use Title III funds for these types of activities, depending on the circumstances. For example, States may use Title III State-level activity funds for planning and interagency coordination activities related to the formula subgrants, under section 3111(b)(2)(B) of the ESEA. See question 22, however, regarding the limitations on using Title III funds to develop ELP assessments.

Other Considerations

24. What responsibilities do States and LEAs have for students who were identified as ELs with disabilities but whose parents/guardians refused EL services, with regard to the annual ELP assessment?

The ESEA does not require that parents provide consent before an LEA or school screens and assesses a child as a potential EL in need of language acquisition services. In addition, section 1111(b)(7) of the ESEA requires an annual assessment of English proficiency of all students with limited English proficiency in the schools served by the State.

Parents can refuse to have their children enrolled in an EL program. However, LEAs may not recommend that parents decline all or some services within an EL program for any reason, and a parent's decision to opt out must be knowing and voluntary. See 2015 DCL, pp. 29-32. When a parent declines participation in services funded by Title III, the LEA must still assess the EL student's ELP with the annual ELP assessment, until that student no longer meets the definition of EL. If the EL is a student with a disability, the same analysis outlined in the 2014 Qs and As questions eight through 10 applies regarding whether the student should be provided accommodations or an alternate assessment to the annual ELP assessment.

⁸ This guidance can be accessed at the following link: <http://www2.ed.gov/programs/sfgp/legislation.html>.

Even if parents opt their children out of an EL program or specific EL services, the children retain their status as EL students. The LEA retains a responsibility to take the “affirmative steps” required by Title VI of the Civil Rights Act of 1964 and the “appropriate action” required by the Equal Educational Opportunities Act of 1974 to provide these children access to its educational programs. To ensure the needs of opt-out EL students are being met, LEAs must periodically monitor the progress of students who have opted out of EL programs or certain EL services and must inform the EL student’s parents if the EL student does not demonstrate appropriate growth in English proficiency or academic subjects due to language barriers. LEAs may meet their obligation to serve opt-out EL students in a variety of ways (*e.g.*, adequate training to classroom teachers on second language acquisition). See 2015 DCL, pp. 29-32.

For additional information on the rights of EL students, see the Office for Civil Rights *Questions and Answers on the Rights of Limited-English Proficient Students*, which can be accessed at the following link: <http://www2.ed.gov/about/offices/list/ocr/qa-ell.html>.